

1992

# Smith Marketing Group and Hugh B. Smith v. Larae Kunz : Brief of Appellant

Utah Court of Appeals

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Tom D. Branch; Attorney for Appellants.

Francis J. Nielson; Attorney for Appellee.

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**BRIEF**

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DOCKET NO. 920814

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IN THE COURT OF APPEALS IN AND FOR THE  
STATE OF UTAH

-----oooOooo-----

SMITH MARKETING GROUP, INC.,	:	
and HUGH B. SMITH,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	Court No. 92-0814-CA
	:	Priority No. 16
LARAE KUNZ,	:	
	:	
Defendant/Appellee,	:	
	:	

-----ooOoo-----

**APPELLANTS' BRIEF**

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This Appeal is from a Judgment  
of the Third Judicial Circuit Court, Salt Lake County,  
the Honorable Judge Philip K. Palmer

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**JAN 20 1993**

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SMITH MARKETING GROUP, INC.,	:	
and HUGH B. SMITH,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	Court No. 92-0814-CA
	:	Priority No. 16
LARAE KUNZ,	:	
	:	
Defendant/Appellee,	:	
	:	

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STATEMENT OF JURISDICTION

Rules 3 and 4 of the Utah Rules of Appellate Procedure confer jurisdiction on this Court to hear this Appeal.

ISSUE PRESENTED FOR REVIEW

Was there sufficient evidence to support the lower Court's finding that the Plaintiffs/Appellants breached the Buyer-Broker Agreement, thereby resulting in a reduced judgment for commissions

due, including the complete omission of attorney fees and costs.

Finding #7:

"The Court finds that Plaintiffs, knowing of Defendant's strong desire to purchase the property in question, knowing of the seller's statement concerning commissions and Defendant's ignorance of such statement, and preparing of an offer wherein the seller would pay a 3% commission in light thereof, did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement." (emphasis added)

DETERMINATIVE AUTHORITY

The determinative authority for this appeal is the well known standard of review outlined in Doelle v. Bradley, 784 P.2d 1176 (Utah 1989) as follows:

"To successfully attack findings of fact, appellant must first marshal all evidence supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings."

See also: Reed v. Alvey, 610 P.2d 1374 (Utah 1980); Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989); Chournos v. D'Agnillo, 642 P.2d 710 (Utah 1982);

STATEMENT OF THE CASE

1. This case is on appeal from the Third Circuit Court Judgment finding in favor of the Plaintiffs/Appellants but in a substantially reduced amount. The Plaintiffs/Appellants sought an award of \$8,000.00 together with attorney fees and costs pursuant

to the Buyer-Broker Agreement. The Court only awarded \$4,000.00 to Plaintiffs/Appellants.

2. The suit was initiated by the Plaintiffs/Appellants, Smith Marketing Group, Inc., and Hugh B. Smith, Broker, naming the Defendant/Appellee LaRae Kunz, buyer, as the Defendant. The Plaintiffs/Appellants were contracted to assist the Defendant/Appellee in purchasing a residence in Salt Lake City, Utah.

3. The parties entered into a Buyer-Broker Agreement. The Defendant/Appellee learned of the availability of the subject property through a mutual friend of hers and the Seller. The Seller took the position in negotiations that he wanted \$175,000.00 for his home and did not want to pay a commission on the sale of the subject property. The Defendant/Appellee requested the Plaintiffs/Appellants to assist her in considering possible purchase of the property. The Defendant/Appellee specifically agreed to include this property under the Buyer-Broker Agreement, subject to the commissioner terms therein. (see exhibit A).

4. At Trial the Defendant/Appellee argued that the Plaintiffs/Appellants violated the Buyer-Broker Agreement.

5. The Plaintiff/Appellant argued that he did not violate the Buyer-Broker Agreement and acted in the best interests of the

Defendant/Appellee.

6. After testimony and evidence, the Lower Court found, in paragraph 7 of its Findings, as follows: "The Court finds that the Plaintiffs (Appellants), knowing of Defendant's (Appellee's) strong desire to purchase the property in question, knowing of the seller's statement concerning commissions and Defendant's ignorance of such statement, and preparing an offer wherein the seller would pay a 3% commission in light thereof, did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement. (R 151) (emphasis added) (see exhibit B)

7. The Trial Court found that the Plaintiffs/Appellants did not fully violate the Agreement as set forth in Finding 8 as follows: "The Court does find that Plaintiffs did perform services for Defendant that benefitted her and enabled her to obtain the property for a better price than the amount initially asked for. (She acquired the property for \$160,000.00). Therefore, under the doctrine of partial performance or equitable relief, Plaintiffs may recover from Defendant a fair and reasonable fee for the services rendered. (See 17A Am. Jur. 2d 646)."

8. The Court entered Judgment against the Defendant/Appellee and in favor of the Plaintiffs/Appellants in the amount of \$4,000.00.



9. Notice of Appeal was filed by the Plaintiffs/Appellants on November 17th, 1992, seeking the full commission due of \$8,000.00, together with attorney fees and costs.

#### STATEMENT OF FACTS

1. On or about March 2, 1991, the Plaintiffs/Appellants and the Defendant/Appellee entered into an Exclusive Authorization to Locate Property (Buyer-Broker Agreement) ("Agreement"). The Agreement provides several conditions binding either the Broker (Plaintiffs/Appellants) or the Buyer (Defendant/Appellee) or both. (see exhibit A)

2. The property in question over which the suit was filed was not listed for sale at the time the Agreement was entered. The Defendant/Appellee learned of the availability of the home through a mutual friend of hers and the seller.

3. In conversations, the seller told the Plaintiffs/Appellants and Defendant/Appellee, prior to any offer to purchase being tendered, that he wanted \$175,000.00 for his home and that he did not want to pay a commission on the sale of his home.(R 325)

4. Desiring to view the home the Defendant/Appellee requested the Plaintiffs/Appellants to accompany her to view the property (R 264). The Plaintiffs/Appellants reminded the

Defendant/Appellee of the Agreement and explained that this property would be included under that Agreement and that he would accompany her with that understanding. Defendant/Appellee specifically agreed to include this property under their Agreement, and in fact did so. (see exhibit A)

5. The parties visited the property on more than one occasion, the first time on February 28th, 1992. The Defendant/Appellee, submitted an offer through Plaintiffs/Appellants (EMSA, see Exhibit C) to the seller offering \$157,000.00 and requesting the seller pay 3% commission (R 270-271). Defendant/Appellee reviewed and signed the offer (Exhibit C) and directed Plaintiffs/Appellants to present it to the seller. Defendant/Appellee had full and sure knowledge that the seller had expressed a desire that he did not want to pay a commission. (R 325)

6. The seller refused the offer.

7. The Defendant/Appellee "fired" the Plaintiffs/Appellants and then purchased the home on her own. Defendant/Appellee thereafter, in direct violation of the Agreement, refused to pay the Plaintiffs/Appellants their commission in the amount of \$8,000.00 as agreed to in the Buyer-Broker Agreement.

### ARGUMENT

I. Was there sufficient evidence to support the lower Court's finding that the Plaintiffs/Appellants breached the Buyer-Broker Agreement, thereby resulting in a reduced judgment including the omission of attorney fees and costs? Case law sets forth the standard to challenge the Findings of the Trial Court as follows:

"To successfully attack findings of fact, appellant must first marshal all evidence supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings." (Doelle v. Bradley 784 P.2d 1176 (Utah 1989))

A review of the only evidence possibly supporting the courts finding that the Defendant/Appellee was ignorant of the seller's position in relation to paying a commission and that the Plaintiff/Appellant solely had this knowledge, could only come from the testimony on record by the Defendant/Appellee as follows:

Record --Examination of the Defendant/Appellee:

Q: Did Dr. Pease tell you at the time that you advised him that Hugh Smith would be coming with you to the house that there was not to be a realtor involved, period?

A: I do not recall that, no.

Q: So if he says that under oath, he's lying or misunderstands or is confused or

something, is that what your testimony is?

A: I don't recall that.

Q: All right. If Dr. Pease testified that the first time she--that would be you--came to our residence she was originally going to come up earlier in the day and could not get free and she called prior to coming up and asked, since the realtor and her had been looking at some other houses, would it be all right if he just came along--do you remember him saying that to you or you saying that to him?

A: No. He's confused with the time frames.

Q: And that he said to you, that would be fine, as long as it's understood there's not going to be a realtor involved in this sale and if you buy this house. Did he say that?

A: I don't remember that conversation, no.

(R 314-315)

The only evidence that the Court could have even mistakenly used to support the Court's finding that resulted in the reduced judgment is set forth above where the Defendant/Appellee denies that Dr. Pease (seller) told her about his position. However, this evidence is at best confused, inconclusive, and is clearly contrary to the balance of her testimony, the Plaintiffs/Appellants' testimony, and the seller's testimony. She does not claim that she didn't now, only that the seller hadn't told her. Her testimony reveals that she did have knowledge of the seller's position on not paying a commission and that that knowledge was had prior to the offer being presented. Consider Defendant/Appellee's testimony as follows:

Record -- Examination of the  
Defendant/Appellee:

Q: But your testimony is up to this point you have -- do you have any knowledge at all that Dr. Pease was concerned about a commission?

A: Hugh (Plaintiffs/Appellants) had mentioned it to me after the second -- on March 2nd after we had left the home.

Q: Before you made your offer?

A: Before I made the offer.

(R 270)

One good example that the Defendant/Appellee had this knowledge contrary to the Trial Courts' finding is that she assisted in the preparation of the offer to purchase and signed it with the commission clause in it. Her testimony continues as follows:

Record

Q: All right. Now, at that point you put together an offer and that is Plaintiff's Exhibit No. 3, if I could borrow that, your Honor. Is that in fact a copy of the offer that Mr. Smith drafted and you signed to presented to Dr. Pease to purchase his home?

A: It is.

Q: Did you read that document before you signed it?

A: This document was explained to me as we went through it by Hugh.

Q: And you in fact consented and agreed to that document and you signed it saying that, did you not?

A: That's correct.

Q: You did?

A: I did.

Q: That was your offer to Dr. Pease to buy the Emigration property?

A: It is.

Q: And that reflects \$157,000 as the purchase price?

A: That's correct.

Q: You knew at the time you made that offer that Dr. Pease was concerned about paying a commission, did you not?

A: Hugh--

Q: Or you did? Excuse me.

A: Hugh had mentioned that, yes.

Q: All right. And you decided anyway and presented in that offer that the seller, Dr. Pease, would share and pay three percent commission; is that not also true?

A: I understood that the seller would pay three percent commission in this document.

Q: You were anxious for Hugh to take that to Dr. Pease, weren't you?

A: I was very anxious.

Q: You thought he might accept that, didn't you?

A: I had full intentions of him accepting it. I hoped he would.

(R 271-273)

In fact, each and every witness testified that the Defendant/Appellee did have a sure knowledge that the seller expressed that he did not want to pay a commission. Only three

witnesses testified on the issue, to wit: the Plaintiff, the Defendant, and the seller, Dr. Pease. As one can determine solely from the testimony given by the Defendant/Appellee, she knew about the seller's position in relation to paying a commission prior to presenting the offer to purchase. This evidence directly contradicts the Finding that the Plaintiffs/Appellants tendered an offer despite the ignorance on part of the Defendant/Appellee in relation to the seller's views on commissions, and that her ignorance was prior to the tendering of the offer, and that by presenting said offer the Plaintiffs/Appellants were in violation of paragraph 3 of the Buyer-Broker Agreement.

Additionally, the Defendant/Appellee signed the offer to purchase (EMSA) which offer includes the clause: "Seller agrees to pay Smith Marketing Group, Inc., a commission of 3% of the sales price at closing. The remainder of SMG, Inc.'s commission to be paid by buyer." (see exhibit C) It is overwhelmingly clear that the Defendant/ Appellee had knowledge about the Seller's position in relation to paying a commission, and could not be found to be ignorant of that position.

In additional testimony derived from the trial we have the testimony of Dr. Pease, the seller, who although called by and for the defense, clearly supports the position of the Plaintiffs/Appellants by setting forth that he in fact did advise

the Defendant/Appellee of his desire to not pay any commission, and this having taken place obviously before the Plaintiffs/Appellants prepared an offer to purchase. (The Trial Court allowed the deposition of Dr. Pease to be read into the record through the Defendant/Appellee's Attorney)as follows:

Record:

Q: "And on an occasion did you meet with LaRae at your home?

A: "I did.

Q: "That was the first couple of weeks in March?

A: "Correct.

Q: "Did you show her through the home?

A: "Showed her through the home.

Q: "Do you remember what you and she talked about on that occasion?

A: "Talked about her buying the house.

Q: "Did she express an interest in the home to you?

A: "She did.

Q: "Do you remember what she said at that time? Did you discuss in detail the price of the home or any other details of the sale of the home?

A: "I did. We discussed the price, which was \$175,000. We also discussed that I had a realtor who was going to list the house and that I had until Friday the 8th of March for LaRae Kunz to come by only as an exempt person so that if she wanted to buy that house that she wouldn't have to pay any realtor commissions on that house.

Q: "Do you recall the name of the realtor?



A: "Magie Gezon.

Q: "And you had a conversation with Magie?

A: "Gezon.

Q: "Gezon?

A: "Yes. G-e-z-o-n.

Q: "And did you discuss the fact that LaRae was interested in the home?"

MR. BRANCH: I objected to hearsay, Your Honor.

THE COURT: The testimony of the realtor would be hearsay.

Q: I agree.

A: "Maggie Gezon and I discussed"--

Q: [to Seller] Excuse me, you can't testify to that so we'll go down to line-- over to the next page which is 8 on line 3. "In your discussion with LaRae Kunz I believe you stated that you discussed the issue of commissions. What did you tell LaRae regarding your position on commissions?"

A: [by Seller] "I was not going to pay any commissions to a realtor if she bought the house and that she had no need to since we had met privately--discussed this privately between the two of us--that there was no need for a commission here and that saved me money and it saved her money."  
(R 325)

Q: "Did she give any response to that position you took on commissions? Did you understand the question, Dr. Pease?

A: "I'm just trying to think back, you know.

Q: "I understand it's been a while and sometimes it's difficult to remember all the details?" Mr. Branch says, "We don't want you to guess, we want you to only testify to what you can testify to under oath, Doctor."

A: [by Seller] "I understand that. I'm thinking. We had that conversation. I basically told her that there were to be no commissions paid by either the buyer or seller, if she was buying my house through a realtor, period. I mean, I don't remember what she said about that but that's what I told her.  
(R 324-326)

Q: [to Seller] "When did you first meet with or speak with Hugh Smith?"

A: [by Seller] "The first time she came to our residence she was originally going to come up earlier in the day and could not get free and she called prior to coming up and asked since the realtor and her had been looking at some other houses, would it be alright if he just came along. And I said that would be fine, as long as he understands that there's not going to be a realtor involved in the sale and that if you buy this house--"

(R 327-328)

Upon examination of the Plaintiffs/Appellants, the third testimony reviewed herein, it is further revealed that:

(a)- As of the 28th of February, 1991, and even before, the Defendant/Appellee knew that the Seller did not want to pay a commission;(R 200)

(b)- That the Defendant/Appellee was actively involved in the preparation of the offer to purchase (exhibit C) and that she signed the offer with the commission clause in it; and (R 205-206)

(c)- That she (again) knew the Seller did not want to pay a commission. (R 208)

Record -- Examination of the  
Plaintiffs/Appellants:

Q: All right. At this time--we're on the 28th or thereabouts--did Ms. Kunz indicate to you that Dr. Pease had told her he would not pay a commission? Was she aware of--

A: Yes, she knew that he would not pay a commission, that he had said he would not pay a commission.  
(R 200)

Q: All right. Was she involved then in the determination of what you were going to put on that earnest money agreement offer?

A: Yes. Every line that there was a variable, we would discuss her options. We discussed price and as a part of price I suggested there were several ways to arrive at a bottom line for her. Price less having him pay part of the commission or having him pay closing costs or we can just ask--just include a lower price and make it a clean offer and have him pay nothing. And we discussed the benefits of each of these.

In my experience over the years in trying to read Mr. Pease I thought that it would probably be a good idea to give him a little more price and less bottom line through a commission. But that was--we both discussed that and she thought that would be a good idea to do that, also, just trying to read him. And so we included the offer at 157 but having him pay almost 4,000 of her commission that she owed me and thereby reducing her price--her effective price in the home to \$153, which was a little closer to what it should be sold for.

(R 205-206)

Q: All right. Now, in offering 157, she realized that was not the asking price of the seller, is that--

A: Yes, she knew that he was asking 175 also. She knew that he was asking quite a bit more than she was offering and she also knew that he had said he would not pay a commission.

(R 208)

The finding of the court and its resulting mitigated award of Judgment as set forth in Finding 7 is clearly erroneous and against the clear weight of the evidence to the contrary as provided by the testimony of the Defendant/Appellee, the seller Dr. Pease, and the Plaintiffs/Appellants. There is no credible evidence to support Finding #7.

### Conclusion

The trial court awarded the Plaintiffs/Appellants a reduced judgment based on its belief and its finding that the Plaintiffs/Appellants failed to perform paragraph 3 of the Buyer-Broker Agreement by not notifying the Defendant/Appellee about the Seller's position on commissions. No other findings supported a reduced judgment.

The trial court had evidence from all three witnesses provided at trial in relation to the most pertinent question as to whether or not the Defendant/Appellee had knowledge of the seller's position in relation to commissions prior to the submission of an offer to purchase. As set forth above, it is clear that the Defendant/Appellee in fact had full knowledge of the seller's position well before the offer to purchase was made to the seller. Even the Defendant/Appellee stated she had the knowledge. She only disputed whether or not the seller himself

told her before the offer. She admitted that Plaintiffs/Appellants had told her.


The Trial Court committed reversible error. Having set forth the evidence of that error, this Court stands in a position to rectify the error and grant the Judgment for \$8,000.00, including an additional award for costs and attorney fees as required in the Buyer-Broker Agreement.

DATED this 20th day of January, 1993.

  
Tom D. Branch  
Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I, Tom D. Branch, hereby certify that I caused to be delivered 8 true and correct copies of the foregoing Appellants' Brief to the Court of Appeals with one signed original, and 4 true and correct copies of the foregoing to Francis J. Nielson, Attorney for Appellee, at 310 South Main Street, Suite 1305, Salt Lake City, Utah 84101, on this 20th day of January, 1993.

  
Tom D. Branch



This AGREEMENT is entered into on this 28th day of February 19 91, by and between  
Hugh B. Smith (Broker) and Lalae Kunz (Buyer).

1. **RETAINER AGREEMENT.** Buyer hereby retains and authorizes Broker on an exclusive basis to locate and/or negotiate for the purchase, exchange and/or lease of real property of a general nature described below.

2. **RETAINER PERIOD:** This Agreement begins on the date first shown above, and ends on March 15th or upon the earlier closing of a property under this Agreement.

3. **BROKER'S OBLIGATIONS:** The Broker will: (a) use diligence in locating a property acceptable to Buyer; (b) use professional knowledge and skills to negotiate for the purchase, exchange, lease, or option to purchase the property; (c) assist Buyer throughout the transaction and act in the Buyer's best interest at all times.

4. **BUYER'S OBLIGATIONS:** The Buyer will: (A) work exclusively with Broker for the purchase, exchange and/or lease of a property; (B) furnish Broker with relevant personal and financial information to facilitate Buyer's ability to purchase property; (C) **IN ALL COMMUNICATIONS WITH OTHER REAL ESTATE AGENTS, NOTIFY THE AGENTS THAT BUYER HAS ENTERED INTO THIS BUYER AGENCY CONTRACT WITH BROKER;** (d) disclose to Broker all properties in which Buyer is either negotiating to purchase, exchange and/or lease or has a present interest in purchasing. Those properties are listed as follows:

4916 Emigration  
all other properties shown to buyer

5. **COMPENSATION:** (A) Buyer agrees to be responsible for compensation of Broker if, during the term of this Agreement, the Buyer, or any other person acting in the Buyer's behalf, buys, exchanges for, leases, or obtains an option on any real property of the general nature described below. Further, Buyer authorizes Broker to participate in a commission paid by the Seller, the payment of which will be credited toward the Buyer's obligation to pay a commission under this Agreement. The payment of any commission by the Seller from the sales proceeds will not make the Broker either the agent or sub-agent of the Seller.

(B) The amount of the compensation shall be the greater of:  
 1) \$2,000, or 2) 5 % of the purchase price of the property, or 3) the amount of any selling commissions paid by the listing brokerage of properties listed for sale. In any event, the compensation shall be paid at closing.

(C) Buyer agrees to compensate Broker if Buyer, or any person acting for Buyer or in Buyer's behalf, purchases, exchanges, leases, or obtains an option to purchase within (2) months after termination of this Agreement any real property of the general nature described in paragraph 6, which property Broker has shown or submitted in writing to Buyer during the term of this Agreement.

6. **GENERAL NATURE OF PROPERTY:** (Check applicable)  
☒ Residential/Personal ☐ Residential/Investment  
☐ Farm ☐ Recreation ☐ Vacant Land  
☐ Commercial/Industrial

7. **SPECIAL TERMS AND CONDITIONS:** The following special terms and conditions are made part of this Agreement:  
none

8. **ATTORNEY'S FEES.** Should any legal action be commenced, involving the rights or duties of either party in connection with this Agreement, the party prevailing in such action shall be entitled, in addition to any other relief, to court costs and actual attorney's fees reasonably incurred in such action, which fees and costs shall be awarded by the court in such action as items of costs.

9. **INTERPRETATION.** This Agreement and all provisions thereof shall be interpreted according to the laws of the State of Utah.

10. **MODIFICATIONS.** This Agreement shall not be modified or amended except in writing signed by both parties agreeing to such amendment or modification.

11. **ENTIRE AGREEMENT.** This Agreement contains the entire agreement between the parties relating to the subject matter of this Agreement, and all prior agreements or representations respecting the subject matter of this Agreement or the rights or duties of either party relating thereto, not expressly set forth in this Agreement, are superseded.

12. **AGENCY RELATIONSHIPS:** Broker agrees to act as the agent of Buyer in any resulting transaction. Depending upon the circumstances, it may be necessary or appropriate for Broker to act as agent of both Buyer and Seller, exchange party, or one or more additional parties in any resulting transaction. In such event, Broker will seek Buyer's consent to Broker's representation of additional parties as soon as practicable, or where Broker is the listing Broker on any property in which Buyer is interested. Buyer understands that Broker will act as agent of only the Seller with respect to a transaction involving that property, unless Buyer and Seller consent to Broker acting for both as a dual agent.

13. **OTHER POTENTIAL BUYERS:** Buyer understands that other potential buyers may consider, make offers on, or purchase through Broker the same or similar properties as Buyer is seeking to acquire. Buyer consents to Broker's representation of such other potential buyers before, during, and after the expiration of this Agreement.

14. **EQUAL HOUSING OPPORTUNITY:** Properties will be presented in compliance with federal, state and local anti-discrimination laws.

**BROKER:**

I agree to render services to Buyer on the terms and conditions stated above.

Date: February 28, 19 91

COMPANY: SMITH MARKETING GROUP, INC.

Agent: Hugh B. Smith

Broker: Hugh B. Smith

**BUYER:**

I agree to employ Broker on the terms and conditions stated above, and acknowledge that I have signed no other similar agreement.

Date: 3/2, 19 91

Buyer: Lalae Kunz

Buyer: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

**RECEIPT**

I acknowledge receipt of a copy of this document bearing all signatures.

Lalae Kunz Date: 2/2/91

Buyer: \_\_\_\_\_ Date: \_\_\_\_\_

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**FILED**

OCT 28 1992

Third Circuit Court  
Salt Lake Department

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IN THE THIRD CIRCUIT COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

SMITH MARKETING GROUP, INC., )  
and HUGH B. SMITH )

Plaintiff, )

vs. )

LaRAE KUNZ, )

Defendant. )

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND JUDGMENT

Civil No. 913011770CV

JUDGE PHILIP K. PALMER

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The above-entitled matter came on for Trial before the Honorable Judge Palmer on September 23, 1992. The Plaintiffs Smith Marketing Group, Inc. and Hugh B. Smith appeared and were represented by their attorney Tom D. Branch, and the Defendant LaRae Kunz appeared and was represented by her attorney Francis J. Nielson. Following the presentation of evidence including witnesses, exhibits, arguments of counsel, and other matters before the Court, and the Court being fully advised in the premises makes the following Findings of Fact, Conclusions of Law, and Judgment:

### FINDINGS OF FACT

1. Plaintiffs sued Defendant for a 5% real estate broker's fee (\$8,000.00) and attorney fees and costs pursuant to a Buyer-Broker Agreement (Plaintiff's Exhibit #2). Defendant claimed failure of Plaintiff to perform "broker's obligations" as stated in paragraph 3 of the agreement as a defense.

2. The property over which this lawsuit arose was not listed for sale at the time in question. Defendant learned of its availability through a mutual friend of hers and the seller's. Defendant requested that Plaintiff, who was assisting her in looking for homes that were listed, accompany her to look at the property in question. Defendant specifically agreed to include the subject property in the coverage of the agreement and the property is listed therein.

3. Plaintiff and Defendant went to visit the property on February 28, 1992. When the owner discovered that Mr. Smith was a realtor, he appeared cool towards him and told him that he would not pay any realtor commission and did not want a realtor involved in the sale. Ms. Kunz liked the home and was not aware that the seller stated he would not pay a realtor commission until several



days later, after the offer was submitted, when she talked with the seller over the telephone.

4. Mr. Smith had several concerns with the property, especially the asking price of \$175,000 which he considered to be too high. Ms. Kunz indicated to him that the home was just what she wanted and that she was willing to pay a little above the appraisal which was between \$150,000 to \$155,000.

5. Mr. Smith, with the input of Ms. Kunz, prepared and Ms. Kunz signed an "Earnest Money Sales Agreement" (Plaintiff's Exhibit #3) in which Ms. Kunz extended an offer to purchase the property for \$157,000 with the seller to pay 3% of the realtor commission. When this offer was presented to the seller, he became completely antagonized. At this point, he contacted Ms. Kunz and for the first time let her know that he would not pay any realtor commission.

6. Mr. Smith testified that he did not believe the commission clause in the offer would kill the sale, and Ms. Kunz expressed no such concern either. Of course, at the time the offer was prepared, only Mr. Smith knew of the seller's position about not paying any commission. Ms. Kunz did not find out of the seller's

feelings on the commission until after the offer was presented.

7. The Court finds that Plaintiffs, knowing of Defendant's strong desire to purchase the property in question, knowing of the seller's statement concerning commissions and Defendant's ignorance of such statement, and preparing of an offer wherein the seller would pay a 3% commission in light thereof, did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement.

8. The Court does find that Plaintiffs did perform services for Defendant that benefitted her and enabled her to obtain the property for a better price than the amount initially asked for. (She acquired the property for \$160,000). Therefore, under the doctrine of partial performance or equitable relief, Plaintiffs may recover from Defendant a fair and reasonable fee for the services rendered. (See 17A Am. Jur. 2d 646).

9. If the property in question had been listed under the multiple listing service, the probable fee Plaintiffs would have received from a successful sale of the property would be half of the agreed commission of 5%. This would be  $2\frac{1}{2}\%$  of \$160,000.00 or \$4,000.00. This is the measure of damages which the Court finds

the Plaintiffs are entitled to. No attorney fees or costs are awarded.

CONCLUSIONS OF LAW

1. The Plaintiffs are entitled to a Judgment against the Defendant in the amount of \$4,000.00.

Based upon the above findings of Fact and Conclusions of Law, the Court enters the following:

JUDGMENT

Based upon the above Findings of Fact and Conclusions of Law which are incorporated herein, the Court orders that the Plaintiffs be granted a Judgment against the Defendant LaRae Kunz in the amount of \$4,000.00. No attorney fees or costs are awarded.


NOTICE TO DEFENDANT AND HER COUNSEL:

You will please take notice that the above and foregoing will be submitted to the Court for signature upon the expiration of five

(5) days from the date of this notice, together with three (3) days for mailing, unless written objection is filed prior to that time.

DATED this 27 day of oct., 1992.

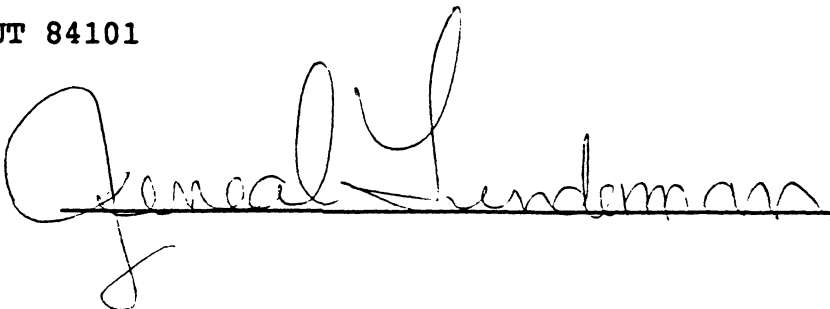
BY THE COURT:

  
JUDGE PHILIP K. PALMER

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing on this 9TH day of October, 1992, to:

Francis J. Nielson  
Attorney at Law  
310 South Main Street  
Suite 1305  
Salt Lake City, UT 84101



smithmar/p\fof.jud

Legend    Yes (X)    No (O)

This is a legally binding contract. Read the entire document carefully before signing



### GENERAL PROVISIONS (Sections)

**INCLUDED ITEMS.** Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property, plumbing, heating, air conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitting, trees and shrubs

**INSPECTION.** Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, inspection shall be allowed by Seller but arranged for and paid by Buyer.

**Seller WARRANTIES.** Seller warrants that (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not yet been remedied prior to closing, (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be paid in full prior to closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound and in good working condition at closing.

**CONDITION OF WELL.** Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adequate supply of water and that the use of the well or wells is authorized by a state permit or other legal water right.

**CONDITION OF SEPTIC TANK.** Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

**ACCELERATION CLAUSE.** Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, or trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally release the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, the earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

**TITLE INSPECTION.** Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. After closing, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

**TITLE INSURANCE.** If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by the title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and no encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall be returned to Buyer unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any title insurance charge.

**EXISTING TENANT LEASES.** If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

**CHANGES DURING TRANSACTION.** During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

Yes(X) No(O)

DATE:

March 2, 1991

signed Buyer

La Rae Kunz

hereby deposits with Brokerage

T MONEY, the amount of

One Thousand

Dollars (\$ 1,000.00 )

of personal check to be deposited upon acceptance by all parties  
be deposited in accordance with applicable State Law.

Marketing Group, Inc. 566-0499

Received by

H. L. B. Smith

Phone Number

### OFFER TO PURCHASE

ERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at

4916 E.

in the City of \_\_\_\_\_ County of Salt Lake, Utah,

any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in

with Section G. Said property is owned by Rob Pease as sellers, and is more particularly described

2320 total square foot home on a lot which has 31,350 total square feet.

#### APPLICABLE BOXES:

IMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other \_\_\_\_\_

ROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other \_\_\_\_\_

cluded Items. Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property.

Following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: if refrigerator

all other appliances now in house including hot tub & hot tub equipment

cluded Items. The following items are specifically excluded from this sale: washer & dryer

CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price:

ilic sewer ☐ connected ☒ well ☒ connected ☐ other \_\_\_\_\_ ☒ electricity ☒ connected

ilic tank ☒ connected ☐ irrigation water / secondary system ☒ ingress & egress by private easement

er sanitary system ☐ of shares ☐ Company ☒ dedicated road ☒ paved

ilic water ☒ connected ☒ TV antenna ☒ master antenna ☒ prewired ☒ curb and gutter

water ☒ connected ☒ natural gas ☒ connected ☐ other points

urvey. A certified survey shall be furnished at the expense of \_\_\_\_\_ prior to closing. ☒ shall not be furnished.

uyer inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical

ition except \_\_\_\_\_

CHARGE PRICE AND FINANCING. The total purchase price for the property is

15,000.00 Dollars (\$ 15,000.00 ) which shall be paid as follows:

20. which represents the aforescribed EARNEST MONEY DEPOSIT

1,500. representing the approximate balance of CASH DOWN PAYMENT at closing

2. representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer,

which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_

which include: ☐ principal; ☒ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other \_\_\_\_\_

2. representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be

assumed by Buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_

which include: ☐ principal; ☐ interest; ☐ taxes; ☐ insurance; ☐ condo fees; ☐ other \_\_\_\_\_

24,500. representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows: as proceeds

from the new loan to be secured against subject property by a 1st

trust deed & note.

Other \_\_\_\_\_

7,000. TOTAL PURCHASE PRICE

Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts

ume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees

ke application within 10 days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at

rest rate not to exceed 9.5 % If Buyer does not qualify for the assumption and/or financing within 45 days after Seller's acceptance

Agreement, this Agreement shall be voidable at the option of the Seller upon written notice. Seller agrees to pay up to 2 N/A mortgage loan discount

, not to exceed \$ N/A In addition, seller agrees to pay \$ N/A to be used for Buyer's other loan costs.

Abstract. Transfer of Seller's ownership interest shall be made as set forth in Section H.

Abstracts and exceptions noted herein, evidenced by ☒ a current policy of title insurance in the amount of purchase price ☐ an abstract of title brought current, to the opinion of the title company (See Section H).

SECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☒ has not reviewed any condominium CC & R's prior to signing this Agreement.

SECTION OF TITLE. Title shall vest in Buyer as follows: Le Roy Kuntz

SELLER'S WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: None

Limitations on the above and Section C shall be limited to the following: None

SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied at closing: Seller agrees to pay Smith Marketing Group, Inc. a commission of 3% of the sales price at closing. The responsibility of SMIG Inc. is to be paid by buyer.

CLOSING OF SALE. This Agreement shall be closed on or before April 15, 1991 at a reasonable location to be designated by the parties. Prorations set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other \_\_\_\_\_

POSSESSION. Seller shall deliver possession to Buyer on closing date unless extended by written agreement of parties.

AGENCY DISCLOSURE. At the signing of this Agreement the listing agent Hugh Smith represents ( ) Seller ( ☒ ) Buyer, as selling agent Hugh Smith represents ( ) Seller ( ☒ ) Buyer. Buyer and Seller confirm that prior to signing this Agreement disclosure of the agency relationship(s) was provided to him/her. ( ☒ ) Buyer's initials ( ☐ ) Seller's initials.

GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN INCORPORATED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall accept this offer until 10:00 AM March 2, 1991. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

Seller's Signature \_\_\_\_\_ (Date) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_ (SSN/TAX ID) \_\_\_\_\_

Buyer's Signature \_\_\_\_\_ (Date) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_ (SSN/TAX ID) \_\_\_\_\_

COUNTER OFFER. Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

REJECTION. Seller hereby REJECTS the foregoing offer. \_\_\_\_\_ (Seller's Initials)

COUNTER OFFER. Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until \_\_\_\_\_ (AM/PM) \_\_\_\_\_, 19\_\_\_\_ to accept the terms specified below.

Seller's Signature \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_ (SSN/TAX ID) \_\_\_\_\_

Buyer's Signature \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_ (SSN/TAX ID) \_\_\_\_\_

CHECK ONE:

ACCEPTANCE OF COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER

REJECTION. Buyer hereby REJECTS the COUNTER OFFER. \_\_\_\_\_ (Buyer's Initials)

COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

Buyer's Signature \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_ (Buyer's Signature) \_\_\_\_\_ (Date) \_\_\_\_\_ (Time) \_\_\_\_\_

#### DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed).

A. ☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

SIGNATURE OF SELLER \_\_\_\_\_

SIGNATURE OF BUYER \_\_\_\_\_

\_\_\_\_\_  
Date \_\_\_\_\_ Date \_\_\_\_\_

\_\_\_\_\_  
Date \_\_\_\_\_ Date \_\_\_\_\_

B. ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_

**AUTHORITY OF SIGNATORS.** If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement shall have the authority to do so and to bind Buyer or Seller.

**COMPLETE AGREEMENT — NO ORAL AGREEMENTS.** This instrument constitutes the entire agreement between the parties and supersedes and cancels any prior negotiations, representations, warranties, understandings or agreements between the parties. There are no oral agreements which modify or affect this Agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

**COUNTER OFFERS.** Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement unless expressly modified or excluded therein.

**DEFAULT/INTERPLEADER AND ATTORNEY'S FEES.** In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or institute suit to enforce any rights of Seller. In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition precedent to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to both parties. The parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the money deposit an amount necessary to advance the costs of bringing the interpleader action. The amount of deposit remaining after advancing those costs shall be turned over to the court and the court shall order the deposit divided into court in accordance with state law. The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action.

**ABROGATION.** Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement.

**RISK OF LOSS.** All risk of loss or damage to the property shall be borne by the Seller until closing. In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property or declare this Agreement null and void. If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace damaged property prior to closing, this transaction shall proceed as agreed.

**TIME IS OF ESSENCE—UNAVOIDABLE DELAY.** In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, floods, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein. Thereafter, time shall be of the essence. This provision relates only to the extension of closing dates. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

**CLOSING COSTS.** Seller and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless otherwise required by the lending institution. Costs of providing title insurance or an abstract brought current shall be paid by Seller. Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest on unpaid obligations shall be prorated as set forth in Section 8. Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing.

**REAL PROPERTY CONVEYANCING.** If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those existing herein. If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, or (b) assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein.

**NOTICE.** Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required. If any such timely required notice is not given, the contingency with respect to which the notice was to be given shall be automatically terminated and this Agreement is in full force and effect. If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice.

**BROKERAGE.** For purposes of this Agreement, any references to the term, "Brokerage" shall mean the respective listing or selling real estate office.

**DAYS.** For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays.

**FOUR OF A FOUR PAGE FORM.**